ATTORNEY FOR APPELLANT:

THEODORE J. MINCH
Sovich Minch, LLP
McCordsville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GARY SCOTT HOLLAND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A01-0712-CR-542
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Kim Van Valer, Judge
Cause No. 41D03-0409-FD-211

July 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Gary Scott Holland ("Holland") appeals his convictions of Operating a Vehicle while Intoxicated ("OWI") with a prior OWI conviction, a Class D felony,[1] his adjudication as a Habitual Substance Offender ("HSO")[2] and his sentence. We affirm.

Issues

Holland raises five issues, which we restate as follows:

I. Whether the State violated Holland's Due Process right to inspect the State's physical evidence by destroying his blood sample three months after disclosing a toxicology report;

II. Whether the trial court abused its discretion in admitting testimony that Holland failed two field sobriety tests;[3]

III. Whether the trial court erred in granting the State's Motion in Limine to exclude argument that the jury could ignore the law;

IV. Whether the trial court abused its discretion in rejecting Holland's proposed final jury instructions on negligence and mistake of fact; and

V. Whether his sentence is inappropriate in light of the nature of the offense and his character.

Facts and Procedural History

Johnson County Lieutenant Jerry Pickett ("Lt. Pickett") responded to a dispatch and drove to the identified four-lane highway. Lt. Pickett had been trained in the detection of

[1] Ind. Code § 9-30-5-3(1).

[2] Ind. Code § 35-50-2-10.

[3] Holland also argues that the trial court erred in granting the State's Motion in Limine to exclude any reference to a valid prescription being a defense to Operating a Vehicle while Intoxicated ("OWI"). However, the fact that a person's ingestion of a controlled substance is legal is not relevant to determining whether a person is intoxicated. See State v. Isaacs, 794 N.E.2d 1120, 1123 (Ind. Ct. App. 2003). Furthermore, the

impaired drivers, including a weeklong course in the administration of Standardized Field Sobriety Tests. Lt. Pickett observed a big cloud of dust and a white Mitsubishi Montero. He saw the Montero strike at least one road sign. Following the Montero, Lt. Pickett passed a road sign that had been completely knocked down and another that had been damaged. A photograph showed the shoulder of the road, as well as a damaged road sign next to tracks in the grass. From the tracks, it appeared that four wheels had traveled outside the shoulder and in the grass. Lt. Pickett caught up with the Montero, as it "swerved erratically all over the road," moving "left of the centerline, right of the fog line." Transcript at 90. The officer turned on his vehicle's red and blue lights. The Montero continued down the road and ultimately stopped about two miles from the damaged road signs.

The great majority of the Montero's front windshield was shattered. Holland stated that he had taken Loritab earlier in the day and Xanax about an hour before he drove. According to the officer, Holland "just had a very dazed, confused look. His eyes were very, very glassy, what I call a drunk stupor. He looked very intoxicated." Id. at 95. His speech "was very slow, uh, very lethargic, and a slur in his speech." Id. Lt. Pickett testified that Holland said "he could not believe that the Xanax caused him to drive so poorly. He stated that he just felt confused and very foggy in his head." Id. at 95-96.

Holland stated that he had not pulled over sooner because he was looking for a place to do so. However, the four-lane highway had a shoulder and traffic was light. Lt. Pickett testified that "he could have stopped anywhere." Id. at 95. Also, Holland explained that he

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record was clear that Holland legally possessed certain controlled substances, as the trial exhibits included a prescription and photographs of three prescription bottles.

struck a road sign because a red truck had forced him off the road. Lt. Pickett told Holland that he had not seen another vehicle. Holland replied, "Really, I thought there was a red truck." Id. at 96 (Lt. Pickett quoting Holland).

Holland agreed to take two sobriety tests. According to Lt. Pickett, he administered two Standardized Field Sobriety Tests developed by the National Highway Traffic Safety Administration: the nine-step-walk-and-turn test and the one-leg-stand test. Lt. Pickett described his testing of Holland as follows: he instructed Holland, once all of the instructions had been given, to take nine steps, heel-to-toe, with his arms at his side, to count aloud his steps, to pivot as demonstrated, and to return in the same manner. While receiving instruction, Holland lost his balance and began before the instructions were completed. He again lost his balance, pivoted incorrectly and took ten steps, rather than nine. Lt. Pickett concluded that Holland thereby exhibited five of eight indicia or "clues" of impairment in the test. Id. at 99. He testified that two or more clues constituted failure of the nine-step-walk-and-turn test.

With respect to the one-leg-stand test, Lt. Pickett testified as follows: he demonstrated and instructed Holland to raise one leg six inches off the ground and to count to thirty, with his arms at his side. Holland lost his balance during the instructions, used his arms to balance himself and placed his foot down at counts eight and ten. Lt. Pickett testified that Holland had exhibited three clues of impairment, while two constituted failure.

Furthermore, Lt. Pickett stated that Holland recited the ABCs from A through Q, but could not complete the task. Lt. Pickett found three empty, controlled-substance bottles in

the Montero.

The State charged Holland with six substance-related counts and alleged him to be a HSO. At some point, it appears that the Indiana University Department of Toxicology ("I.U.") destroyed a blood sample taken from Holland. He filed a "Motion to Dismiss / Destruction of Evidence," in which he argued as follows:

> On or about August 20, 2004, the two (2) vials allegedly containing Holland's blood as drawn on August 16, 2004, were turned over [to I.U.] for examination; in a report returned August 25, 2004, [I.U.] determined that Holland's blood was allegedly presumptive positive for Benzodiazepines and Opiates, consistent with an individual who was taking prescribed medication such as Loritab and Xanax.
>
> [I.U.] detected no indication of alcohol or alcohol related byproducts in the blood alleged to have been Holland's.
>
> The [I.U.] report stated that "confirmatory testing was not performed but 'is' available upon request."
>
> Likewise, the [I.U.] report stated that "The remainder of the submitted specimen(s) is/are scheduled to be discarded in six months (180) days from the date of the original report unless alternate arrangements are made in writing prior thereto."
>
> Upon information and belief, the foregoing [I.U.] report was not [disclosed] to Holland by the then counsel for Holland until January 6, 2006 and the first trial setting in this Case was January 25, 2005.
>
> New (current) counsel for Holland entered his appearance in this Case on or about February 23, 2005.[4]

Appendix at 57-58. Holland argued that the destruction of the blood sample prevented him from "confirm[ing] exact amounts of controlled substance in the evidence." Id. at 54.

Per the State's motion, the trial court then dismissed three of the charges: Operating a

Vehicle with a BAC of .15 or More, Operating a Vehicle with a BAC of .08 or More and Operating a Vehicle with a Schedule I or II Controlled Substance or its Metabolite in the Body. The trial court denied Holland's Motion to Dismiss and certified the decision for interlocutory appeal. This Court declined to accept jurisdiction.

Holland's trial was bifurcated. A jury found him guilty of OWI and OWI Endangering a Person. Holland then pled guilty to OWI with a prior OWI conviction in the previous five years and admitted he was a HSO.[5]

After a sentencing hearing, the trial court sentenced Holland to the maximum three-year term of imprisonment on the OWI conviction, to be fully executed, and five years on the HSO enhancement, with two years suspended. Finally, it ordered the sentences to be consecutive, for an aggregate sentence of eight years with two years suspended.[6] Holland now appeals.

Discussion and Decision

I. Destruction of Blood Sample

On appeal, Holland argues that the trial court erred in denying his Motion to Dismiss because the State's destruction of the evidence prevented him from confirming the exact amount of certain controlled substances in his blood sample. As an initial matter, we note that the six substance-related charges originally filed were of two categories: (a) three counts

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[4] Assuming this information to be accurate, Holland's new counsel would have appeared two days prior to I.U.'s deadline for routine destruction of the sample.

[5] The trial court dismissed Holland's convictions of OWI and OWI Endangering a Person.

[6] We remind Appellant's counsel that Indiana Appellate Rule 46(A)(10) requires the appellant to attach a copy of the appealed order to his brief.

for which intoxication was a material element, regardless of certain amounts of particular chemicals in the defendant's blood; and (b) three counts for which precise chemical determinations were necessary – BAC and the presence of a Schedule I or II controlled substance in the blood. The State moved to dismiss the latter three counts. Accordingly, the relevant determination in the three remaining charges was whether Holland was intoxicated.

"Intoxicated" means under the influence of alcohol, a controlled substance or a combination of them "so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Ind. Code § 9-13-2-86. By the statute's plain language, this determination is based upon the person's conduct, not toxicology.

Criminal defendants have a Due Process right to examine the State's physical evidence. Terry v. State, 857 N.E.2d 396, 406 (Ind. Ct. App. 2006), trans. denied. However, that right is not absolute. Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Where destroyed evidence was "materially exculpatory," a Due Process violation occurs. Terry, 857 N.E.2d at 406. Here, however, Holland's motion noted that I.U.'s report was "consistent with an individual who was taking prescribed medication such as Loritab and Xanax." App. at 57. Furthermore, as noted above, the person's conduct, not toxicology, is a material element of the charges. Therefore, Holland has not established that the blood sample was materially exculpatory.

Where the State's destroyed evidence is merely "potentially useful," the defendant must show that the State acted in bad faith. Terry, 857 N.E.2d at 406. First, Holland asks this Court to adopt the position of the twenty-year-old dissent in Youngblood. We decline

his invitation. Second, in his memorandum, Holland asserted that the I.U. "report was not [disclosed] to Holland by the then counsel for Holland until January 6, 2006," almost eleven months after the university deadline. App. at 58. However, more than three months before the deadline, the State notified the trial court that it had provided the toxicology report to Holland and that it might call as a witness "a representative from the Department of Toxicology." Id. at 31. While the State's Notice of Discovery Compliance did not mention the university's policy for routine disposal of samples, this record does not suggest that the State acted in bad faith. Therefore, the destruction of the blood sample did not deny Holland his Due Process right to examine the State's physical evidence.

II. Admission of Testimony regarding Field Sobriety Tests

Next, Holland argues that the trial court abused its discretion in admitting Lt. Pickett's testimony that Holland failed two field sobriety tests. We review the trial court's ruling on the admission of evidence for an abuse of discretion. McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005).

"The only evidentiary foundation required for the admission of field sobriety tests is that the officer through whom the evidence is offered establish his training and experience in administering such tests." Smith v. State, 751 N.E.2d 280, 282 (Ind. Ct. App. 2001), aff'd on reh'g on other grounds, 755 N.E.2d 1150 (Ind. Ct. App. 2001), trans. denied. Holland seeks to distinguish the instant case from Smith, arguing that Smith addresses only an officer's description of the defendant's performance of the test and not the admissibility of an officer's "ultimate conclusion whether an accused has passed or failed." Appellant's Brief at 24.

However, our Opinion in Smith addressed the admission of "test results" and made clear that "Smith failed each of the [field sobriety] tests." Smith, 751 N.E.2d at 281-82. We conclude that the decision in Smith is directly on point and well-reasoned. As the Smith Court noted,

> the field sobriety tests at issue [one-leg-stand, count backwards, walk along straight line and count to four touching thumb to each finger] do not involve any complex scientific process or principles. The test results are reported as an officer's observations about a defendant's ability to perform simple tasks.

Id. at 282.

Lt. Pickett testified that he had served for twenty years with the Johnson County Sheriff's Office and that he had received OWI-detection training with the Indiana Law Enforcement Academy, a week-long class in administering Standardized Field Sobriety Testing and "updates of Indiana law and DUI detection." Tr. at 82. He also testified as follows:

> Q: [W]ere any of the impaired people you tested on were they impaired with alcohol or were they impaired with drugs?
>
> A: Alcohol.
>
> Q: Have you ever had any training with impairment caused by drugs?
>
> A: On the job, yes. Actual classroom training, uh, they've never brought anybody in that was impaired on drugs, but what they've told us that the drugs will mimic the alcohol, the effects of drugs mimic alcohol. So you are looking for the same clues, the same type behavior.

Id. at 83-84. Accordingly, Lt. Pickett established that he had training and experience in the administration of field sobriety tests.

In the alternative, Holland argues that the trial court should not have allowed any testimony regarding the field sobriety tests because they are only scientifically relevant to

detection of alcohol impairment, not impairment from the ingestion of a controlled substance. Lt. Pickett testified to the contrary, stating that the tests were relevant to determining whether a person had consumed a controlled substance, as "the effects of drugs mimic alcohol." Id. Meanwhile, in Willis v. State, we cited evidence of failed field sobriety tests in concluding that Willis' OWI conviction was supported by sufficient evidence, despite the fact that Willis ingested a controlled substance, but not alcohol. Willis v. State, 806 N.E.2d 817, 824 (Ind. Ct. App. 2004). The case cited by Holland, Mann v. State, is irrelevant as Mann ingested alcohol, not a controlled substance. Mann v. State, 754 N.E.2d 544, 546-47 (Ind. Ct. App. 2001), trans. denied. For these reasons, the trial court did not abuse its discretion in admitting Lt. Pickett's testimony.

Even if admission of any of the testimony was an abuse of discretion, any error was harmless. Lt. Pickett observed Holland strike one or two road signs and continue swerving from side to side for another two miles with a shattered front windshield. Holland stated that he had ingested two controlled substances that day. Furthermore, Holland either lied or was completely confused when explaining why he struck a road sign. Finally, Holland could not complete the alphabet, stumbling after Q.[7] Holland's argument is unavailing.

III. The Jury's Right to Determine the Law and the Facts

"In all criminal cases whatever, the jury shall have the right to determine the law and the facts." IND. CONST. art. I, § 19. The trial court granted the State's Motion in Limine to exclude argument that the jury could "ignore the law." App. at 76. On appeal, Holland

argues that the trial court abused its discretion in granting the State's motion. However, Holland fails in his Appellant's Brief and in his Reply Brief to make a record citation of his having made a contemporaneous objection. "Rulings on motions in limine are not final decisions and, therefore, do not preserve errors for appeal." Swaynie v. State, 762 N.E.2d 112, 113 (Ind. 2002). A ruling made before trial does not constitute contemporaneous objection. See Vandivier v. State, 822 N.E.2d 1047, 1051 (Ind. Ct. App. 2005) (noting this proposition is settled law), trans. denied. Accordingly, Holland waived appellate review of this issue.

Waiver notwithstanding, we reject Holland's substantive argument. While he is correct that our Supreme Court addressed a proposed jury instruction on this constitutional provision in Holden v. State, the reasoning in Holden applies equally to argument. Holden v. State, 788 N.E.2d 1253, 1255 (Ind. 2003), reh'g granted on other grounds, 799 N.E.2d 538 (Ind. 2003). Whether by instruction or through argument, the jury should not receive any information suggesting that it has the right to ignore or disregard the law. See id.

IV. Jury Instructions regarding Negligence and Mistake of Fact

In Holland's final argument regarding his conviction, he maintains that the trial court abused its discretion in denying his proposed final jury instructions regarding negligence and mistake of fact. However, he fails to include in the record what instructions were actually given. In a criminal appeal, the appellant's appendix must contain the jury instructions if not included in the appellant's brief or the transcript, "when error is predicated on the giving or

[7] During his testimony, Lt. Pickett did not state that Holland's inability to recite the complete alphabet constituted failure. He merely described the task and Holland's performance of it; namely, that Holland could

refusing of any instruction." Ind. Appellate Rule 50(B)(1)(c). The appellant must file a complete record so that the appellate court may perform "an intelligent review of the issues." Miller v. State, 753 N.E.2d 1284, 1287 (Ind. 2001). Absent the presentation of a complete record, the appellant waives the right to appellate review. Id. Therefore, Holland has waived appellate review of this issue.

Notwithstanding this conclusion, the jury should not receive an irrelevant instruction, even if it accurately states the law. See Miller v. State, 825 N.E.2d 884, 889-90 (Ind. Ct. App. 2005), trans. denied. The trial court did not abuse its discretion in rejecting Holland's proposed jury instructions.

V. Whether Holland's Sentence Is Inappropriate

Holland argues that his sentence is inappropriate. Under Indiana Appellate Rule 7(B), this "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); see IND. CONST. art. VII, § 6. A defendant "'must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), clarified on other grounds, 875 N.E.2d 218 (Ind. 2007).

At the sentencing hearing, the parties' arguments addressed almost exclusively Holland's criminal history. The trial court commented as follows:

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recite only A through Q. Transcript at 104.

> Your criminal history is quite extensive. A lot of things dismissed and a lot of things not filed, but a lot of convictions as well. But your history of incarcerations is very minor. But this is your fifth conviction for [OWI]. And when you have sentences that slap you on the wrist over and over and over again, when it comes time for a sentence of incarceration it hits pretty hard.

Tr. at 208. For OWI as a Class D felony, the trial court ordered Holland to execute the maximum, three-year term of imprisonment. In addition, the trial court ordered the HSO enhancement to be five years, with two years suspended, for an aggregate of eight years, with two years suspended.

As to the nature of the offense, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Childress, 848 N.E.2d at 1081. Here, Holland ingested at least two controlled substances and chose to drive his vehicle. Holland swerved left and right, hit two road signs, shattered his windshield and proceeded in this manner for another two miles. For some portion of this distance, Lt. Pickett followed with flashing red and blue lights. Thus, Holland drove impaired, continued despite looking through a shattered windshield and failed to immediately respond to the officer's emergency lights.

Once stopped, Holland told the officer that a red truck had forced him off the road. Lt. Pickett had seen no such vehicle. Holland admitted to having ingested a controlled substance and pondered aloud that it could make him drive so poorly. His impairment was confirmed by his appearance, his speech, repeatedly losing his balance during two field sobriety tests and failing to recite the complete alphabet. His conduct was extremely dangerous, to say the least.

Regarding Holland's character, he has a long list of prior convictions, including six substance-related misdemeanor convictions, four other misdemeanor convictions and one felony conviction. As Holland himself argues on appeal,

> [t]he Court clearly relied upon Holland's past (though unsubstantiated) criminal history that, while admittedly extensive, consisted of only one (1) non-violent prior D felony conviction and a myriad of other non-violent offenses that were primarily related to Holland's apparent addiction to controlled substances.

Appellant's Brief at 35. In citing his myriad non-violent offenses, including at least his fourth OWI conviction, Holland belittles the gravity of driving a car while impaired by controlled substances.

Based upon our review of the case and our consideration of the trial court's decision, we conclude that Holland's sentence is not inappropriate.

Conclusion

The State did not violate Holland's Due Process right to inspect its physical evidence. The trial court did not abuse its discretion in admitting testimony regarding field sobriety tests or in rejecting Holland's proposed jury instructions on negligence and mistake of fact. Nor did the trial court err in precluding Holland from arguing that the jury could ignore the law. Finally, Holland's sentence is not inappropriate.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.